



# OEDCA DIGEST



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***SUMMARIES OF SELECTED DECISIONS ISSUED BY THE OFFICE OF  
EMPLOYMENT DISCRIMINATION COMPLAINT ADJUDICATION***

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## FROM THE DIRECTOR

The Office of Employment Discrimination Complaint Adjudication is an independent adjudication unit created by statute. Located in the Office of the Secretary, OEDCA's function is to issue the Department's final agency decision on complaints of employment discrimination filed against the Department. The Director, whose decisions are not subject to appeal by the Department, reports directly to the Secretary of Veterans Affairs.

Each quarter, OEDCA publishes a digest of selected decisions issued by the Director that might be instructive or otherwise of interest to the Department and its employees. Topics covered in this issue include reasonable accommodation in "statutory disability" cases, "reverse" age discrimination claims, retaliation, age-related comments, VA disability ratings, direct evidence, and liability for sexual harassment. Also included in this issue is an article addressing compensatory damage awards in the federal sector EEO complaint process.

The *OEDCA Digest* now contains a comprehensive cumulative index.

The *OEDCA DIGEST* may be accessed both on the internet at: <http://www.va.gov/orm/oedca.asp> and on the Department of Veterans Affairs Intranet at <http://vaww.va.gov/orm/oedca.htm>.

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## I

### ***EMPLOYEE WITH “RECORD OF A DISABILITY” NOT ENTITLED TO REASONABLE ACCOMMODATION***

Most complaints alleging a failure to accommodate a disability are filed by employees with an actual disability, *i.e.*, a medical impairment that substantially limits one or more of their major life activities. Occasionally, however, individuals without actual disabilities will claim that they are entitled to reasonable accommodation, either because they are wrongfully *perceived* as being disabled, or because they have a *record of* a prior disability. The following case illustrates how such claims are usually decided.

A VA medical center employee (hereinafter referred to as “complainant”), was reassigned to a different campus because of a conflict with another employee. The reassignment increased her commute by an hour to an hour and a half, depending on traffic.

Approximately five months later, she requested reassignment back to her former work location as a reasonable accommodation for her disability, which she described as *grand mal* seizures. She claimed that the longer commute caused increased drowsiness and fatigue and resulted in lower productivity and increased errors in her work. She also claimed that the longer commute caused her to get less sleep, and that sleep deprivation could cause her to have a seizure.

She presented no medical evidence that her impairment had any effect on her ability to perform the essential functions of her job. She also admitted that she has not had a seizure since 1998, and that she no longer takes medication for the condition. After reviewing the facts and evidence surrounding her request, the facility’s Reasonable Accommodation Committee denied it in January 2005, whereupon the complainant filed the instant complaint.

After completion of the Department’s investigation, OEDCA issued a final agency decision (FAD) concluding that the complainant’s rights under *The Americans with Disabilities Act* had not been violated. Specifically, OEDCA found that the complainant did not have an actual disability during the time frame in question. In other words, the complainant’s medical condition did not substantially limit any of her major life activities, including her ability to work. Hence, she was not entitled to an accommodation, given her present medical condition.

While she did not have an actual disability, OEDCA found that she had a “statutory” disability, *i.e.*, she had “a record of” *grand mal* seizures from 1996 to 1998. This finding was based on the fact that *The Americans with Disabilities Act* also includes within the definition of “individual with a disability” those who are “regarded as” disabled and those with “a record of” a disability.



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Given the complainant's "statutory disability", *i.e.*, her "record of" a disability, the question now was whether she was entitled to a reasonable accommodation absent an actual disability? OEDCA concluded that she was not so entitled.

OEDCA found this case to be analogous to cases where an individual is "regarded as" (*i.e.*, "perceived as") disabled but, in fact, is not disabled. In such cases, courts have generally held that individuals who are regarded as disabled, but are not actually disabled, are not entitled to reasonable accommodation, as there is no actual disability requiring accommodation.<sup>1</sup>

The same would be true for individuals who qualify as disabled merely because they have a record of a disability. Absent a current, actual disability, there is nothing to accommodate. In reaching this conclusion, OEDCA examined the legislative history of *The Americans With Disabilities Act*, and found that the intent of Congress in extending statutory coverage to individuals with a record of a disability was to prevent disparate treatment of individuals who have been classified

or labeled, correctly or incorrectly, as having a disability (*i.e.*, a substantially limiting impairment), and to protect individuals who have recovered, in whole or in part, from a disability, but are subjected to disparate treatment because of their history of a substantially limiting impairment.

## II

### ***REVERSE AGE DISCRIMINATION CLAIM REJECTED BY EEOC JUDGE***

A VA employee ("complainant") alleged, among other things, that his failure to be selected for a Patient Services Assistant position was due to his age. Although the complainant was over 40 years of age at the time of his nonselection, the person selected for the position was actually 14 years older than the complainant was.

An EEOC judge issued a decision without a hearing in the VA's favor, concluding that the complainant had failed to establish even a *prima facie* case of age discrimination. OEDCA accepted and implemented the judge's decision.

The *Age Discrimination in Employment Act* (ADEA) allows employees who are 40 years of age or older to file an age discrimination complaint in connection with an employment related matter. Usually, individuals who file such complaints allege that they received less favorable treatment than did a similarly situated younger

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<sup>1</sup> A few Circuit Courts of Appeal have held otherwise, at least in certain unusual circumstances. The 10<sup>th</sup> Circuit, for example, recently held that "an employer who is unable or unwilling to shed his or her stereotypic assumptions based on a faulty or prejudiced perception of an employee's abilities must be prepared to accommodate the artificial limitations created by his or her own faulty perceptions." *Kelly v. Metallica West, Inc.*, 410 F.3d 670. *See also, Williams v. Philadelphia Housing Authority Police Department*, 380 F.3d 751 (3d Cir. 2004). Such reasoning, however, would not apply to the circumstances of this case.



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individual. In this case, however, the complainant alleged the exact opposite, *i.e.*, that he was treated less favorably than was a similarly situated older employee.

Until recently, the Equal Employment Opportunity Commission would have permitted such a claim to go forward, as it had been the Commission's position that the ADEA prohibits all forms of age discrimination, and is not limited to complaints by older employees claiming discrimination in favor of younger employees. In fact, in the Spring 2001 edition of the *OEDCA Digest*, we reported on two Postal Service cases in which the Commission ruled in favor of younger employees who claimed that the provision in a collective bargaining agreement that conferred "tie breaker" seniority to the individual with the earliest date of birth violated the ADEA because it granted a preference based on age.

In light of a recent ruling by the U.S. Supreme Court, however, such claims are no longer recognized under the ADEA.<sup>2</sup> In so ruling, the court noted that "the enemy of 40 is 30, not 50."

### III

#### ***SELECTING OFFICIAL'S REASONS FOR NOT CHOOSING COMPLAINANT WERE A PRETEXT FOR GENDER DISCRIMINATION AND RETALIATION***

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<sup>2</sup> *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581 (2004).

The following case illustrates some typical examples of the evidence that EEOC judges and OEDCA may rely on when finding that a selecting official's reasons for not choosing someone are not credible and, hence, pretextual.

In January and June 2004, the Chief of Pharmacy filled two positions, one a Pharmacist IV Specialist and the other a Supervisory Pharmacist. The complainant, who had 14 years of pharmacy experience at the facility, including IV room experience, applied but was not selected for either position. The Chief testified that the individuals selected were "better qualified".

The Chief, without conducting interviews, selected a less experienced female applicant with no VA work experience for the IV Specialist position. The EEOC judge found that the Chief's testimony at the hearing regarding this selection action was contradicted by other witnesses, and was otherwise not credible. This, coupled with the complainant's superior work experience at the facility and other evidence in record, caused the judge to find the Chief's reasons for her selection to be a pretext for gender discrimination.

For the supervisory position, a panel was convened to interview applicants. The Chief eventually selected a female applicant with less experience, and whom witnesses described as disorganized. Moreover, witnesses, including a panel member, testified that the complainant had much better commu-



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nication and computer skills, both of which were considered desirable for the position.

The judge noted that the Chief did not retain any documents relating to the selection process, including the selectee's application. The judge further noted that the Chief had previously stated that the "old boy system was gone and ... the old girl system was taking its place." Finally, evidence showed that the Chief had mentioned to the other panel members during the interview process that the complainant had filed a discrimination complaint regarding his nonselection for the IV Specialist position.

The judge found the above facts, along with other evidence in the record, sufficient to prove that the Chief's reasons for her selection decision were a pretext for gender discrimination and retaliation.

There are several lessons to be learned from this case. First, comments to a selection panel or official about a candidate's prior EEO activity will almost always be construed as persuasive evidence of reprisal. Such comments are obviously offered for the sole purpose of providing the panel or official with a reason for not choosing someone. Absent evidence to the contrary, a fact-finder may conclude that the comments did in fact influence the panel or official; *i.e.*, their decision was based, at least in part, on the complainant's prior EEO activity.

Likewise, comments such as the one

about substituting an "old boy system" with an "old girl system" will almost always be construed as persuasive evidence of gender discrimination, especially when made by a selecting official. "Payback" is not a legally authorized defense under civil rights laws.

It is imperative that selection officials and selection panels retain documents relating to the selection process. There have been several recent findings of discrimination that resulted, in whole or in part, from the failure to maintain such records.

Finally, passing over an applicant who, on paper at least, appears to be better qualified than the selectee always raises a red flag. Justifying such a selection decision by simply stating the selectee was "better qualified" will, absent a clear and specific explanation for that conclusion, result in a finding of discrimination.

## IV

### ***NO AGE DISCRIMINATION DESPITE SELECTING OFFICIAL'S AGE-RELATED COMMENT***

The following case shows why it is important to avoid comments about a person's age, even if the comments are made with the intent to flatter.

An employee complained of age discrimination when she was notified of her nonselection for a supply technician position.



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The advertised position required more than just the ability to order supplies at someone's request. It required inventory management skills; *i.e.*, the ability to operate independently in managing 14 inventory points for medical supplies, make decisions on inventory, forecast usage, determine how critical the item is, make the purchase, determine the arrival time from the vendor, and maintain at all times a 30-day supply of all medical items for the entire hospital.

At the time, the complainant was an Equipment Operator, but had been given, at her request, additional duties, including one in the supply field (credit card purchases), so that she might become better qualified for future promotion opportunities. The additional supply-related duty involved making purchases with agency credit cards -- one of many duties performed by a supply technician. However, the complainant's responsibility was limited to ordering noncritical office supplies for two "control points" (*i.e.*, offices or sections).

The selecting official for the position was the complainant's supervisor. The reasons given for not choosing the complainant were the selectee's numerous years of experience in exactly this type of job while in the military, the complainant's lack of comparable experience, and concerns regarding the complainant's inability to handle multiple job duties in her current position.

The complainant's only evidence of age

discrimination was a comment made by her supervisor relating to her age. Specifically, the record indicated that the complainant was discussing her success on the *Weight Watchers* diet program with her supervisor one day. During this discussion the supervisor stated that the complainant also mentioned her age, at which point the supervisor complimented her on her appearance. The supervisor also told her how great she looked for her age, and that she just could not believe how old the complainant was. The supervisor admitted telling other individuals of the complainant's age, noting that they had similar reactions of disbelief.

An EEOC judge rejected the complainant's contention that these comments evidenced age bias. The judge noted that the comments were obviously not of a negative nature; they were clearly intended to compliment the complainant's appearance. To be evidence of age discrimination, something suggesting age as negatively affecting abilities or performance would have been necessary.

Although finding no age discrimination, the judge pointed out what in this day and age should be obvious to supervisors and managers. Comments relating to an individual's age or appearance, not matter how innocuous or well intended, should always be avoided, as they may, and often do, later surface as evidence in an EEO complaint. Even if the complaint fails, judgment in management's favor comes only after considerable time and effort has been spent responding to



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the complaint -- time which could have been better spent accomplishing mission-related activities.

## V

### ***COMPLAINANT'S EVIDENCE OF AGE DISCRIMINATION NOT PERSUASIVE, AND HIS 10% VA DISABILITY RATING NOT EVIDENCE OF A DISABILITY***

This case illustrates two common misconceptions about the probative value of certain types of evidence in EEO cases.

The complainant, an honorably discharged veteran, applied but was not selected for a medical technician position. Upon learning of his nonselection, he filed an EEO complaint alleging discrimination due to his age and disability.

The selecting official denied the complainant's allegations, stating that the selectees for the five vacancies had far greater experience that was more recent, while the complainant's experience, gained some twenty years ago, was outdated.

Prior to his application, he had received a 10% "disability" rating from the VA for phlebitis in his left leg. A ten percent rating is the lowest rating awarded by the VA for a medical condition found to be service-connected.

The VA rating provides no information about the effects of the complainant's

condition, though the 10% figure would at least suggest that it did not substantially limit any of his major life activities. Despite being asked to provide additional information about his disability during the course of the investigation, he failed to do so; and in fact admitted that medication alleviated any problems he had with walking and standing, and that his condition did not substantially limit any of his major life activities. The complainant thus appeared to be relying solely on his VA disability rating to prove the existence of a disability.

The only other evidence offered by the complainant was his statement that the selecting official candidly admitted to him that his nonselection was due to his age and disability.

After reviewing the investigative file, OEDCA found insufficient evidence to support the complainant's allegations of discrimination. As for the disability claim, the complainant failed to prove the existence of a disability, notwithstanding his 10% disability rating issued under VA's disability compensation regulations.

To qualify as a disability under EEO law, an individual must show that he or she has a physical or mental impairment that substantially limits one or more major life activities, or has a record of such an impairment, or is regarded as having such an impairment.

"Major life activities" include – but are not limited to – functions such as caring for one's self, performing manual



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tasks, walking, seeing, hearing, speaking, breathing, learning, and working. In addition to the above requirements, the impairment must generally be permanent, not temporary in nature. In some circumstances, two or more impairments that are not substantially limiting by themselves may together substantially limit the major life activity of an individual.

The VA's disability ratings, on the other hand, represent the average impairment in overall earning capacity and are designed to compensate for loss of working time. Thus, to be eligible for a VA disability rating, a veteran does not necessarily have to show a substantial limitation of a major life activity, even though many veterans with disability ratings obviously do have such limitations. Instead, the veteran need only show a service-connected medical condition that, to some extent, impairs earning capacity, even though the condition may not substantially limit a major life activity at the present time, as is required by *The Rehabilitation Act* and *The Americans with Disabilities Act*.

By the same token, some veterans may not be eligible for a VA disability rating because they lack a qualifying impairment under VA's regulations, yet they could still be considered disabled under *The Rehabilitation Act*. For example, a veteran may have a record of a substantially limiting impairment, even if he or she no longer has the impairment; or may be perceived by an employer as having a substantially limiting impairment,

even if he or she does not actually have such an impairment. Each of these situations would fall within the statutory definition of "disability" under *The Rehabilitation Act*, yet would not satisfy the VA's requirements for awarding a disability rating.

Thus, the fact that a veteran has a disability rating issued pursuant to VA compensation statutes does not necessarily prove that the veteran has a disability under applicable civil rights laws. Any veteran with a VA disability rating who is claiming disability discrimination must do more than simply offer evidence of a VA disability rating to prove the existence of a disability. He or she must generally present medical or other evidence sufficient to show (1) a medical impairment that substantially limits a major life activity, or (2) a record of such impairment, or (3) a perception by an employer of such impairment.

VA's EEO investigators must be alert to these definitional distinctions. Veterans frequently assume, quite understandably, that their VA disability rating is sufficient, in itself, to prove they are disabled for purposes of their EEO claim. Thus, it is essential for EEO investigators to ensure that veterans who present evidence of a VA disability rating are given adequate notice that they must also provide the requisite medical or other evidence showing that they have a disability as defined by *The Rehabilitation Act*. The investigator in this case provided the complainant with such notice and opportunity, and the complainant failed to





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offer anything other than his VA rating. Thus, he failed to prove the existence of a disability.

As for the alleged statement made by the selecting official, OEDCA acknowledged that such a statement, if true, would constitute direct evidence of bias and be sufficient, in itself, to find in the complainant's favor. However, for such evidence to have probative value there must be corroborative evidence that the statement was, in fact, made. Otherwise, anyone filing a complaint and making such an assertion would automatically prevail simply by making the assertion.

In this case the complainant presented no such evidence, and the selecting official denied making the statement. Thus, whom to believe was a credibility question. There was no evidence in the record that detracted from the selecting official's credibility. In addition, if the selecting official did act on such bias, it is highly unlikely -- indeed almost beyond belief -- that she would have been so foolish as to admit it, especially to the person whom she had allegedly wronged! Thus the weight of the evidence favored the selecting official's denial over the complainant's assertion.

## VI

### ***VA LIABLE FOR SEXUAL HARASSMENT***

A Resource Center Coach at a VA medical facility had an office adjacent

to the complainant's cubicle, and was the complainant's immediate supervisor. On one occasion, he wrote a sexually explicit note and instructed another employee to explain it to the complainant. In the following months, he made several other sexual comments in the workplace that referenced male and female body parts. He also inquired as to whether the complainant had engaged in sexual activity at a certain age.

During this same time period, a male coworker, who also worked directly under the Resource Center Coach, began giving the complainant personal cards, notes, and gifts despite her objections. The coworker frequently walked by the complainant's cubicle and stared at her in a suggestive manner. She informed the supervisor of the unwanted advances, but he took no action to stop the harassing conduct. The coworker was a favorite of the supervisor, and both of them described their relationship as akin to that of a "father-son" relationship.

Upon reporting the actions of the coworker to the supervisor, the male coworker began directing obscene gestures toward the complainant. In December, after concluding that nothing was being done to halt the harassment, she reported it to the Service Center Manager. Unfortunately, he delayed investigating the matter until he returned from holiday leave.

When he did finally investigate in January, he counseled both the supervisor and the coworker and granted



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the complainant's request for a reassignment. Despite these actions, the coworker continued to harass her whenever he saw her.

After the conclusion of a hearing on the matter, an EEOC administrative judge found that the complainant was subjected to unwanted conduct of a sexual nature by both the supervisor and the coworker, and that the harassment created an intimidating, hostile, and offensive work environment. OEDCA agreed with the judge, as a preponderance of the evidence supported the complainant's version of the events.

The judge further determined that the Department was liable for the harassment. OEDCA agreed with that finding also. In the case of the supervisory harassment, management was unable to avail itself of the affirmative defense available to employers because it could not show that the complainant unreasonably failed to bring the supervisor's harassment to management's attention.

As for the harassment committed by the coworker, management failed to take prompt and effective action to correct the problem. The delay in investigating the matter was inexcusable (other officials in the unit were available during the holiday leave period), and the harassment continued despite the reassignment and the counseling.

Among other things, this case illustrates how vulnerable an employer is

when the harasser is the victim's supervisor. Liability is automatic –i.e., no affirmative defense is available to the employer – if the supervisor takes a tangible employment action.

However, even in the absence of a tangible employment action, management usually has a difficult time establishing the affirmative defense available to it. It must first prove that it took effective preventive measures, which must include an anti-harassment policy. Along with preventive measures, it must also prove that it took prompt, corrective action and that the victim unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer, or to avoid harm otherwise. This is a stringent standard of employer liability. Employers are frequently unable to establish this affirmative defense.

## VII

### **COMPENSATORY DAMAGES IN THE FEDERAL SECTOR EEO COMPLAINT PROCESS: AN OVERVIEW**

*(The following article recently appeared in the EEOC's Digest of EEO Law, Winter 2005, Vol. XVI, No. 1. It provides an excellent summary of the rules for determining whether an individual who prevails in a discrimination complaint is entitled to an award of compensatory damages and, if so, the amount of the award.*

#### **A Brief History**

Title VII of the Civil Rights Act of



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1964<sup>1</sup> is a powerful tool used to eliminate discrimination in the workplace. Under the Act, courts have the power to issue an injunction against an employer once the employer is found to have engaged in unlawful employment practices. In addition, the statute provides that a court may order "such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay, or any other equitable relief as the court deems appropriate."<sup>2</sup> The protections of Title VII were extended to employees of the federal government in 1972, and the Commission was granted the authority to enforce the prohibition against discrimination in the government through "appropriate remedies."<sup>3</sup>

In 1991, Congress found that additional legislation was required to prevent unlawful harassment and intentional discrimination in the workplace. The Civil Rights Act of 1991 added a new section to the Civil Rights statutes that dramatically changed the damages available in cases of intentional discrimination. Under § 1981A (a)(1), a complaining party pursuing a claim under Title VII, the Americans with Disabilities Act or the Rehabilitation Act could now recover compensatory damages against a respondent that engaged in intentional discrimination.<sup>4</sup> Since damages were made available in addition to any relief authorized under § 706(g) of Title VII, the remedies of back pay, front pay and other previously available remedies were not affected. Subsequently, in *West v. Gibson*,<sup>5</sup> the Supreme Court

held that the Commission had the legal authority to require federal agencies to pay compensatory damages when they are found in violation of Title VII.

## ***Types of Damages***

Compensatory damages, which are intended to remunerate an individual for harm or injury, consist of two types: pecuniary and non-pecuniary. Pecuniary damages are awarded to compensate a complainant for out-of-pocket expenses resulting from an employer's unlawful conduct. Examples of pecuniary losses include moving expenses, employment search expenses, medical expenses, psychiatric expenses, physical therapy expenses, and other quantifiable out-of-pocket expenses. Pecuniary losses may include past expenses, which are out-of-pocket expenses that occurred prior to the date of the resolution of the damage claim, or future expenses, which are out-of-pocket expenses likely to occur in the future after resolution of the complaint. Receipts, records, bills, cancelled checks and confirmation by other individuals can be used to ascertain the amount to be awarded for past pecuniary losses. Without documentation, however, damages for past pecuniary losses typically will not be awarded to the complainant.<sup>6</sup>

Nonpecuniary damages are available for emotional harm, including emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, loss of health, and other nonpecuniary losses that are incurred as a re-



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sult of the discriminatory conduct. Due to their intangible quality, nonpecuniary losses are more difficult to prove than their pecuniary counterparts. A finding of discrimination does not carry a presumption of emotional harm. There must be proof of the existence, nature, and severity of the emotional harm. Examples of how the emotional harm may manifest include sleeplessness, anxiety, stress, depression, marital strain, humiliation, and emotional distress. The harm may also manifest itself physically, for example the development of ulcers, hair loss and headaches.<sup>7</sup> Nonpecuniary damages may also be awarded if an individual experiences considerable inconvenience, damage to professional reputation and loss of future earning capacity. The statute specifically limits awards of future pecuniary damages and non-pecuniary damages to \$300,000 for employers of 501 or more employees, and provides that punitive damages are not available against the federal government or a government agency.

## ***Proof of Damages***

The necessary elements of proof for a claim of compensatory damages are proof of actual harm or injury and proof that the unlawful conduct caused the harm or injury.<sup>8</sup> The complainant must prove that there has been a compensable harm or loss and that the cause of such harm or loss is attributable to the unlawful conduct of the agency. The complainant bears the burden of proof and must sufficiently establish a causal connection

between the respondent's illegal conduct and the complainant's injury.<sup>9</sup>

While pecuniary damages can be proven with such evidence as bills and receipts, evidence required to prove non-pecuniary damages (e.g., emotional harm) can be less tangible in nature. In *Carle v. Dept. of Navy*,<sup>10</sup> the Commission described the types of evidence that would support a claim of emotional harm, including a statement from the complainant describing her emotional distress, and statements from witnesses, on and off the job, describing the stress. To properly explain the emotional distress, the Commission reasoned that the statement should include specific information regarding the physical or behavioral manifestations of the distress, duration of the stress and examples of the impact of the distress while at work and while not at work. The Commission also concluded that other evidence linking the distress to the unlawful discrimination was necessary. The Commission has concluded, however, that evidence from a health care provider is not a mandatory prerequisite for recovery of compensatory damages for emotional distress.<sup>11</sup>

Complainants with a pre-existing condition are not foreclosed from pursuing a claim for emotional harm. If the complainant had a pre-existing emotional condition and his or her mental health deteriorates as a result of the discriminatory conduct, the additional harm may be attributed to the employer.<sup>12</sup> On the other hand, where the complainant's emotional harm is



due in part to personal difficulties that were not caused or exacerbated by the discriminatory conduct, the employer is liable only for the harm caused by the discrimination.<sup>13</sup>

The Commission's Enforcement Guidance acknowledges that damage awards for emotional harm differ greatly, and there are no clear rules governing the amounts to be awarded. When determining these types of awards, however, it is necessary to limit the amount to the sums necessary to compensate the individual for actual harm. Though different methods of computing damage awards may be appropriate in certain cases, generally, the method for computing nonpecuniary damages should be based on consideration of the duration of the harm and the nature and severity of the harm. When deciding a case that involves compensatory damages, the Commission looks to other cases that involve similar harm.<sup>14</sup> The Commission also strives to ensure that awards are not monstrously excessive standing alone, nor are they the result of passion or prejudice.<sup>15</sup>

### ***Overview of Nonpecuniary Damage Awards of \$100,000 or More***

In one of the Commission's highest nonpecuniary awards, *Estate of Nason v. United States Postal Service*,<sup>16</sup> the complainant committed suicide, leaving a suicide note that blamed the agency for her stress. The Administrative Judge found that the agency had discriminated against the complainant on the basis of disability and

in reprisal for prior EEO activity, and awarded \$150,000 in nonpecuniary compensatory damages. The evidence in the record included testimony from the complainant's husband that her work situation caused a loss in her ability to interact with him and their children, and caused feelings of hopelessness and extreme depression. The complainant's mother testified that the complainant was "extremely depressed and upset on a constant basis." The Commission recognized that the complainant's estate did not offer any medical evidence beyond a report issued by the physician who conducted the complainant's fitness for duty exam. Nevertheless, the Commission concluded that the record disclosed that the agency's conduct produced far-reaching symptoms of emotional distress, which strained relationships and contributed to the complainant's decision to end her life.

When the complainant in *Franklin v. United States Postal Service*<sup>17</sup> was denied a request for light duty due to his degenerative knee condition and also denied reassignment several months later, he filed an EEO complaint. The Administrative Judge found that the agency had discriminated against complainant on the basis of disability, and awarded \$150,000 in nonpecuniary compensatory damages. The Commission noted that although the complainant offered no medical evidence of his depression, the record did disclose a causal link between the agency's conduct and the complainant's emotional distress, which affected his relationships and his per-



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sonality, and decreased his enjoyment of life. The complainant suffered humiliation at not being able to find a comparable job and experienced such shame and despair that interaction with his family became strained.

In *Ellis v. Department of Defense*,<sup>18</sup> the complainant alleged that she was subjected to a hostile work environment created by her supervisor. The complainant retired approximately one year after her supervisor left the facility. The agency found discrimination on the basis of gender and disability, citing numerous incidents of harassment, including criticism of her work, ridicule of her physical and emotional condition, statements to the complainant that she should kill herself and ostracism in the workplace. The complainant indicated that her existing medical condition (fibromyalgia) was exacerbated by the supervisor's conduct. The complainant submitted a statement that detailed the changes in her life as a result of the discrimination, which included sleeping problems, destruction of her self-image, financial problems, mental anguish, and loss of health. The complainant also revealed that a doctor had diagnosed her with Post Traumatic Stress Disorder (PTSD). Another physician also stated that the complainant's movement was noticeably restricted, she had grief issues surrounding loss of her health, she had difficulty concentrating and she had feelings of helplessness. The Commission awarded \$125,000 in non-pecuniary damages. The Commission took note of complainant's pre-existing medical

condition, but found that the nature, severity, and duration of complainant's suffering justified the award.

In *Hendley v. Department of Justice*,<sup>19</sup> the complainant alleged discrimination on the basis of sex and retaliation when the agency disciplined her for inappropriate behavior after she raised claims of harassment. The agency argued that it was only responsible for aggravation of the pre-existing condition and that an award for non-pecuniary harm related to complainant's emotional distress should be reduced by 25 percent due to the presence of the pre-existing condition. The Commission rejected this argument, and concluded that the complainant's treatment was due in large part to the agency's discrimination. When the complainant became aware of the agency's decision to discipline her for the incidents of sexual harassment that she had reported, complainant recounted having an initially severe reaction. Prior to the agency's decision to discipline, the complainant was receiving treatment for the sexual assault, but had improved to the point that she was ready to resume work. Complainant stated that she became distraught, anxious, depressed, and filled with despair. In addition, the complainant became fearful, paranoid, anti-social, and suffered from sleep problems. The complainant's treating psychiatrist confirmed that several of these symptoms were related to inappropriate sexual advances made towards her at work, but the symptoms reoccurred as a result of the agency's actions. The psy-



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chiatrist opined that complainant would require treatment for the rest of her life. The complainant also submitted a statement from a psychotherapist who stated that complainant's need for continued therapy was due partly to the agency's actions. In granting a non-pecuniary damages award of \$125,000, the Commission took into account that seven years after the agency's actions, the complainant continued to receive therapy and take medication and was expected to need an additional two years of treatment. The Commission also considered the fact that the complainant's career pursuits had been reduced.

The complainant in *Hughes v. Department of Veteran Affairs*,<sup>20</sup> alleged that his supervisor sexually harassed him for a period of 15 years, including inappropriately touching and fondling complainant, and threatening and intimidating him in order to prevent him from reporting the harassing behavior.<sup>21</sup> The Commission awarded complainant \$125,000 in compensatory damages. Evidence in the record consisted of medical documentation that supported the conclusion that there had been emotional harm. The complainant suffered from PTSD, extreme stress, nightmares and depression. The complainant's doctor listed numerous medications that were prescribed for the physical effects of the harassment. The Commission also found credible the complainant's assertion that he would require treatment for the rest of his life. In granting this award, the Commission considered the observations of the com-

plainant's doctors, the evidence of harm sustained, the elapsed and expected period of the harm, the complainant's diagnosis of PTSD, the sexual dysfunction that the complainant experienced, the failure of his marriage and the continuing social phobias.

In *Holland v. Social Security Administration*,<sup>22</sup> the complainant alleged discrimination on the basis of mental disability (Depression and Obsessive Compulsive Disorder) and reprisal for prior EEO activity. Nearly ten years prior to working for the agency, complainant began receiving treatment for his psychiatric disorders. The complainant, who answered telephones and inputted data into the computers, requested time to perform non-telephone duties for several hours each day as a reasonable accommodation. The agency rejected the complainant's request as well as the complainant's subsequent request for use of three hours of leave without pay per day. Upon denial of both requests, the complainant applied for and was granted disability retirement. Relying on medical evidence submitted by the complainant, the Administrative Judge concluded that the complainant experienced a "severe emotional injury" due to his constructive discharge. The evidence consisted of the complainant's statement and the statements of the complainant's treating psychiatrist, who confirmed that the complainant experienced feelings of worthlessness and low self-image in the five years following the discrimination. In addition, the Administra-



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tive Judge concluded that the granting of \$100,000 in nonpecuniary damages was justified by the severity of the harm, which included exacerbation of the complainant's pre-existing mental disorder, and feelings of rejection, shame, and anger, and the duration of the harm, that is on-going for at least five years. The Commission noted that the extent of the agency's liability was restricted to the additional harm caused by the agency's illegal conduct. Nevertheless, the emotional symptoms described by the complainant and confirmed by both of the complainant's treating doctors justified the award.

The complainant alleged discrimination on the basis of reprisal for prior Title VII EEO activity in *Leatherman v. Department of Navy*.<sup>23</sup> Incidents of harassment included a letter of reprimand, humiliation during a staff meeting and criticism concerning a job task. In its decision, the Commission noted that in cases where the Commission has awarded non-pecuniary damages that exceed \$40,000, the evidence demonstrated that the "emotional or psychological injuries that resulted from the agency's conduct either had permanent or substantially long term effects, or were so catastrophic that no inquiry into long-term effects was necessary." The complainant was hospitalized on two occasions, and took various anti-depressants and psycho-tropic medications for over one year. She stated that she was unable to sleep, experienced suicidal thoughts and was anxious. In addition, the complainant's psychiatrist diagnosed the complainant's condition as severe

major depression. Noting the serious nature and the duration of the complainant's suffering, the Commission awarded \$100,000 in nonpecuniary damages.

## Footnotes

<sup>1</sup> 42 U.S.C. § 2000e.

<sup>2</sup> Id. § 2000e-5(g)(1)(1991).

<sup>3</sup> Id. § 2000 e-16(b)(1).

<sup>4</sup> Section 102 of the Civil Rights Act of 1991 was codified as 42 U.S.C. 1981 and hereinafter will be referred to as § 1981A.

<sup>5</sup> 527 U.S. 212 (1999).

<sup>6</sup> EEOC Enforcement Guidance: Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991, EEOC Notice No. N. 915.002 (July 14, 1992) (hereinafter referred to as Enforcement Guidance).

<sup>7</sup> Id.

<sup>8</sup> Id.

<sup>9</sup> Id.

<sup>10</sup> EEOC Appeal No. 01922369 (January 5, 1993).

<sup>11</sup> *Economou v. Department of Army*, EEOC Appeal No. 01983435 (August 5, 1999).

<sup>12</sup> Enforcement Guidance, *supra* n.6.

<sup>13</sup> Id.

<sup>14</sup> Id.

<sup>15</sup> *Cygnar v. City of Chicago*, 865 F.2d 827, 848 (7th Cir.).

<sup>16</sup> EEOC Appeal No. 01A01563 (June 21, 2001).

<sup>17</sup> EEOC Appeal Nos. 07A00025 and 01A03882 (January 19, 2001).

<sup>18</sup> EEOC Appeal No. 01A13314 (April 29, 2003).

<sup>19</sup> EEOC Appeal No. 01A20977 (May 15, 2003), request for reconsideration denied, EEOC Request No. 05A30962.

<sup>20</sup> EEOC Appeal No. 07A10095 (August 30, 2002).

<sup>21</sup> Though the harassment spanned a period of 15 years, the Commission assessment was based on the period of November 21, 1991 to 1995 since compensatory damages only became available to complainants after the effective date of the CRA of 1991, November 21,





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1991.

<sup>22</sup> EEOC Appeal No. 01A0372 (October 2, 2003).

<sup>23</sup> EEOC Appeal No. 01A12222 (December 14, 2001).





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        Credibility: II, 4, pp. 8-9 and 9-11; III, 3, p. 2-3; IV, 1, p. 8-9; IV, 3, p. 5-6 and 6-7; V, 1, p. 5-6; V, 2, p. 8-10; V, 3, p. 8-10; V, 3, 13-16; VI, 4, p. 2-3; **IX, 4, p. 7-9**  
    Derogatory Comments: VII, 4, p. 4-6  
    Direct: III, 1, p. 9; III, 2, p. 4; VII, 4, p. 4-6  
    Favoritism: VI, 3, p. 2  
    Opinion *vs.* Evidence: (See: *Evidence: Belief vs. ...*)  
    Preponderance (of the): II, 2, p. 6  
    Proof (burden of): III, 3, pp. 2-3 and 3-4  
    "Similarly Situated": (See: *Employees; See also: Disciplinary/Negative Actions*)  
    Statistical: V, 3, p. 13-16  
    Substantial (appellate review standard): IX, 3, p. 7-8  
    Suspicion *vs.* Evidence: (See: *Evidence: Belief vs. ...*)  
    Pretext: (See: *Removal Actions: Pretext, and Promotions/Selections/Hiring: Pretext*)  
    Unfairness: II, 2, p. 6; V, 3, p. 13-16  
Experience (as evidence of qualifications): (See: *Promotions: Pretext: Evidence*)

## F

Failure to Cooperate: III, 1, p. 3-4; V, 4, p. 10-11  
Failure to Hire, Promote or Select: (See: *Promotions/Selections/Hiring*)  
Failure to State a Claim: III, 1, pp. 5 and 13; III, 3, p. 5-6; IV, 4, p. 9-10; V, 1, pp. 7 and 7-8; V, 4, p. 7-8; VI, 1, p. 15; VI, 2, pp. 2-3 and 4-5; VIII, 2, p. 7-8; VIII, 3, p. 9-10; VIII, 4, pp. 4-5 and 8-9; IX, 2, p. 2; IX, 3, p. 2-3  
False Statements: (consequences of making): VIII, 2, p. 11; (*But See Also: Harassment: Corrective Action: Discipline of Victim*)  
Favoritism (as evidence of discrimination): (See: *Evidence*)  
Food Service Workers (applying *Americans With Disabilities Act* to): VIII, 3, p. 11-15  
Forced Retirement/Resignation (See: *Constructive Discharge*)  
Forum (Choice of): (See: *Election of Remedies*)  
Friendship (as evidence of discrimination): (See: *Evidence: Favoritism*)  
Frivolous (complaints): VI, 2, p. 4-5; VII, 1, p. 7-9; IX, 3, p. 10-11 (article about)  
Future Harm or Injury (Risk of): (See: *Disability: Direct Threat*)



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## G

Gender Dysphoria: (See: *Disability: Type of*; See Also: *Trans-Gender Behavior*)

Gender Stereotypes: VII, 1, p. 5-6

Genetic Information (collection, use, and disclosure of): V, 1, p. 13-16

Grievance Procedures: (See: *Election of Remedies*)

## H

Handicap: (See: *Disability*)

Harassment (includes sexual and non-sexual):

Automatic (Strict) Liability: VI, 2, p. 9 (fn.3); VI, 4, p. 4-5; VII, 4, p. 6-8; VIII, 1, p. 3-4; **IX, 4, p. 9-10**

Anti-Harassment Policy (requirement for): II, 4, p. 11-15

Article about: III, 3, p. 11-12; VII, 3, p. 11-12

Because of Association: (See: *Association with EEO Protected Individuals*)

Because of Gender: I, 1, p. 6; VII, 1, p. 5-6 VII, 3, p. 2-4

Because of Disability: VI, 2, p. 8-10; VIII, 1, p. 25-28

Because of National Origin: V, 4, p. 13-14

Because of Race: I, 1, p. 6; II, 3, p. 4-5; V, 1, p. 9-11; VII, 3, p. 6-7; VII, 4, p. 10-11

Because of Sex (*i.e.*, sexual in nature): III, 4, p. 8-10; IV, 3, p. 11-12; VI, 1, p. 10-12; VI, 2, p. 8-10  
VIII, 3, p. 7-8 and 9-10

Because of Sexual Orientation: IV, 3, p. 13-14

Because of Trans-Gender or Trans-Sexual Behavior: (See: *Trans-Gender Behavior*)

By Co-workers: (See: *Harassment: Liability of Employer: Harassment Committed by*)

By Patients: (See: *Harassment: Liability of Employer: Harassment Committed by*)

By Supervisors: (See: *Harassment: Liability of Employer: Harassment Committed by*)

By Subordinates: (See: *Harassment: Liability: Harassment Committed by*)

Comments about Appearance: III, 3, p. 11-12

Coerced Sex: VI, 4, p. 4-5; VII, 4, p. 6-8

Confidentiality (pledge of): II, 4, p. 3

Consensual Sexual Relationships: II, 1, p. 5; VII, 3, p. 11-12

Continuing Violation: VI, 4, p. 6-8

Corrective Action (*In General*): I, 1 14; VI, 3, p. 3-4

Discipline/Negative Action (against victim): (See: *Reprisal: Discipline/Negative Action*)

Discipline of Supervisors/Managers: III, 3, p. 11-12; III, 4, p. 20

Reassignment of Harasser: VIII, 4, p. 9

Reassignment of Victim: (See: *Reprisal: Reassignment of Harassment Victim*)

Failure to Act as Retaliation: II, 1, p. 5

Definition of: III, 2, p. 4-5; VII, 4, p. 10-11; VIII, 3, p. 7-8

Disability: (See: *Harassment: Because of*)

Discipline (of coworker-harasser): VI, 4, p. 3-4; VII, 1, p. 2

Discipline (of victim): (See: *Reprisal: Discipline of Harassment Victim*)

Elements of Proof: III, 4, p. 8-10

"Equal Opportunity Harasser": I, 1, p. 6; IV, 3, p. 11-13

False Claims: VIII, 2, p. 11 (*But See Also: Harassment: Corrective Action: Discipline of Victim*)

Frequency of: (See: *Harassment: "Severe or Pervasive"*)

Gender: (See: *Harassment: Because of*)

Investigation of:

Duty to Conduct: II, 4, p. 3; III, 1, pp. 13 and 14-15; VI, 2, p. 8-10

Duty to Cooperate: VI, 3, p. 9-10

Alleged to be Discriminatory/Harassing: III, 1, p. 13; V, 2, p. 10; VIII, 4, p. 9

Isolated Remarks/Incidents: (See: *Harassment: "Severe or Pervasive"*)

Liability of Employer: (See also: *Harassment: Automatic Liability*)

Harassment Committed by:

Co-workers: I, 1, p. 3-4 and p. 14; II, 3, p. 2-3; III, 4, p. 8-10; IV, 3, pp. 3-4,  
4-5, and 6-7; V, 1, p. 9-11; VI, 1, p. 2-3; VI, 4, p. 6-8; VII, 1, p. 2  
**IX, 4, p. 9-10**

Patients: IX, 3, p. 2-3

Subordinates: III, 1, p. 14-15; VI, 1, p. 10-12

Volunteers: I, 1, p. 4

Harassment Committed by Supervisors (in general): I, 1, p. 10-11 and 14-15; II, 2, p. 8;  
III, 4, p. 4-5; VI, 2, p. 8-10; VI, 3, p. 3-4; VI, 4, p. 6-8; VII, 3, p. 6-7; VII, 4, p. 6-8;  
**IX, 4, p. 9-10**

Affirmative Defense (employer's): II, 4, p. 6-7; VI, 2, p. 8-10; VI, 3, p. 3-4; **IX, 4, p. 9-10**

Duty of Employer to Prevent and Correct: III, 4, p. 8-10; VII, 3, p. 6-7;

VIII, 1, p. 3-4; **IX, 4, p. 9-10**

Duty of Victim to Timely Report: III, 4, p. 8-10; **IX, 4, p. 9-10**



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Duty of Victim to Avoid Harm: VI, 3, p. 3-4  
Management's Response: (*See: Harassment: Liability of Employer*)  
National Origin: (*See: Harassment: Because of*)  
Race: (*See: Harassment: Because of*)  
Rejection (of sexual advances): (*See: Harassment: Coerced Sex*)  
Report (duty of victim to): (*See: Harassment: Liability: Harassment Committed by Supervisors: Affirmative Defense*)  
Retaliation (against victim of): (*See: Reprisal: Discipline*)  
Romance (workplace): VII, 3, p. 11-12 (article)  
Rudeness (of supervisor): VII, 4, p. 10-11; VIII, 2, p. 7-8  
Sex (harassment because of): (*See: Harassment: Because of*)  
Same Sex: I, 1, p. 10-11; III, 4, p. 8-10  
"Severe or Pervasive": I, 1, p. 10-11; II, 3, p. 4; III, 2, p. 4-5; III, 4, p. 4-5; IV, 2, p. 2-3  
IV, 3, pp. 4-5 and 11-13; V, 1, pp. 7 and 7-8; VI, 2, pp. 2-3 and 5-6 and 8-10; VI, 4, p. 6-8;  
VII, 1, p. 5-6; VII, 4, p. 10-11; VIII, 1, p. 2-3; VIII, 3, p. 7-8; VIII, 4, p. 9; IX, 2, p. 2  
Sexual Conduct: IV, 3, p. 11-13  
Strict Liability: (*See: Harassment: Automatic Liability*)  
Sexual Orientation: (*See: Sexual Orientation; See also: Harassment: Because of*)  
Submission (to sexual advances): (*See: Harassment: Coerced Sex*)  
Subordinates (romancing of): VII, 3, p. 11-12 (article)  
Tangible Employment Action: (*See: Harassment: Automatic Liability; See also: Harassment: Coerced Sex*)  
Touching Employees: III, 3, p. 11-12; III, 4, p. 4-5; IV, 3, p. 3-4, 4-5, and 11-13; VI, 2, p. 8-10;  
VII, 4, p. 6-8; VIII, 1, p. 2-3; IX, 3, p. 2-3  
Trans-Gender (Trans-Sexual) Behavior: (*See: Trans-Gender Behavior*)  
Unwelcome: I, 1, p. 10-11; IV, 3, pp. 3-4 and 4-5; VI, 3, p. 3-4  
Harm (need to show): (*See: Aggrieved*)  
Health Records (*See: Disability: Medical Records*)  
Hearing Impairments: (*See: Disability: Type of*)  
Hearing Process (cooperation during): III, 1, p. 3-5  
Heart Conditions: (*See: Disability: Type of*)  
Hiring: (*See: Promotions/Selections/Hiring*)

## I

Illegal Drug Use (*See: Disability: Type of: Drug Use*)  
Impairment: (*See: Disability: Type of*)  
"Individual with a Disability": (*See: Disability: Type of*)  
Information (medical): (*See: Disability: Medical Records*)  
Injuries: (*See: Disability: Accommodation*)  
Intellectual Disabilities: (*See: Disability: Type of*)  
Interim Earnings (offsetting): (*See: Back Pay*)  
Intimidation: (*See: Reprisal: "Per Se" Reprisal*)  
Interference (*See: Reprisal: "Per Se" Reprisal*)  
Investigation (duty to cooperate with): VI, 3, p. 9-10  
Interviews: (*See: Promotions/Selections/Hiring; See Also: Disability: Interviews*)  
Involuntary Retirement/Resignation (*See: Constructive Discharge*)

## J

Job Injuries: (*See: Disability: Accommodation*)  
Jurisdiction (lack of): (*See: Failure to State a Claim*)

## K

## L

Limited Relief/Remedies: (*See: Remedies: Limited*)  
Latex Allergies: (*See: Disability: Type of: Allergies*)  
Licensure: I, 1, p. 2; VII, 2, p. 8-10

## M

Manipulation (of the promotion/selection/hiring process): (*See: Promotions/Selections/Hiring: Manipulation of the Process*)  
Mediation: (*See: ADR*)  
Medical Condition/Impairment: (*See: Disability*)  
Medical Examinations/Inquiries: (*See: Disability: Medical Examinations/Inquiries*)  
Medical Information: (*See: Disability: Medical Records*)





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Mental Impairment: (*See: Disability: Type of*)  
Merit Systems Protection Board (appeals to): (*See: Election of Remedies*)  
Mistake of Fact: (*See: Settlement Agreements*)  
Mixed Case Complaint (election to pursue): (*See: Election of Remedies*)  
Moot(ness): IV, 4, p. 10-11  
MSPB Appeals: (*See: Election of Remedies*)  
Multiple Ailments: (*See: Disability: Type of*)

## N

National Origin: V, 4, p. 12-15 ; VI, 2, p. 2-3  
Negative Employment Actions: (*See: Disciplinary/Negative Actions*)  
Negative Employment References: V, 3, p. 10-12  
Negotiated Grievance Procedure (election to pursue): (*See: Election of Remedies*)  
Non Job-Related Injuries: (*See: Disability: Accommodation*)  
Non-Sexual Harassment: (*See: Harassment*)  
Numerosity: (*See: Class Action Complaints*)  
Nurses:  
    Examinations (Nursing Board): IX, 1, p. 6-7  
    GNT (Graduate Nurse Technician) Program: IX, 1, p. 6-7  
    Licensure: I, 1, p. 2; VII, 2, p. 8-10  
    Lifting Restrictions: (*See: Disability: Type of*)  
    Nurse Professional Standards Board: I, 1, p. 16  
    Performance: (*See: Nurses: Promotions (non-competitive): Performance*)  
    Promotions (non-competitive): I, 1, p. 16; IV, 4, p. 2-3; VI, 2, p. 6-8  
    Nurse Qualifications Standards: I, 1, p. 16; VI, 2, p. 6-8  
    Performance (as justification for): IV, 4, p. 2-3; VI, 2, p. 6-8  
    Proficiency Reports: I, 1, p. 16; VI, 2, p. 6-8

## O

Obesity: (*See: Disability: Type of*)  
"Observably Superior": (*See: "Plainly Superior"*)  
Offensive Remarks: (*See: Comments*)  
Official Time (to prepare for/participate in EEO process): VIII, 2, pp. 4-5 and 9-10; IX, 2, p. 7-8  
Offsets (to back pay awards): (*See: Back Pay*)  
"Opposition" (activity opposing discrimination): (*See: Reprisal: Protected EEO Activity*)  
Oral Agreements: (*See: Settlement Agreements*)  
OWCP Claims (denied or controverted): III, 3, p. 5-6; V, 4, p. 7-8; VIII, 4, p. 4-5  
OWCP Clearances (to return to full duty): (*See: Disability: Accommodation*)

## P

Paranoid Schizophrenia: (*See: Disability: Type of*)  
Parking Spaces (*See: Disability: Accommodation*)  
Participation (in EEO complaint process): (*See: Reprisal: Protected EEO Activity*)  
Performance (removal/termination because of): (*See: Removal Actions*)  
Performance Appraisals:  
    Pretext:  
        Found:  
        Not Found:  
    Reason(s) articulated for --  
        Burden of articulation met (specific reason given for nonpromotion or nonselection)  
        Burden of articulation not met (no reason or nonspecific reason given)  
            I, 1, p. 16-17; III, 3, p. 3-4; III, 4, p. 5-6; IV, 2, p. 3-4  
        Found not true (see Pretext Found)  
        Found True (see Pretext Not Found)  
    Use of (in promotion/selection actions): II, 3, p. 3  
Performance Problems (need to document): V, 3, pp. 8-10 and 10-12; VI, 4, pp. 2-3 and 5-6  
Physical Impairment: (*See: Disability: Type of*)  
Pregnancy (discrimination because of): VII, 4, p. 8; IX, 2, p. 6-7  
Pre-Selection: (*See: Promotions/Selections/Hiring: Pre-Selections*)  
Priority Consideration: (*See: Promotions/Selections/Hiring: Priority Consideration*)  
Problem Employees: V, 3, pp. 8-10 and 10-12; VI, 4, p. 5-6; VII, 1, p. 9-10 (article); VII, 2, p. 3-4  
    (*See also: Performance Problems*)  
Procedural Dismissals: (*See specific ground(s) for dismissal – e.g., failure to state a claim, untimeliness, etc.*)



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## Promotions/Selections/Hiring:

- Affirmative Action Plans (use of): II, 1, p. 7
- Applications: II, 3, p. 3; V, 2, p. 2; VI, 2, p. 10-12; VIII, 4, p. 3-4
- Disqualification (by HR specialist): VI, 2, p. 10-12
- Documentation (need to retain): III, 4, p. 5-6; IV, 4, p. 4-5; V, 3, p. 8-10; VI, 1, p. 5-6; VI, 4, pp. 2-3 and 8-9; VIII, 4, p. 10-11; **IX, 4, p. 4-5**
- Education: (*See: Qualifications: Education*)
- Experience: (*See: Promotions/Selections/Hiring: Pretext: Evidence*)
- Innocence of Decision Maker: V, 3, p. 2-3;
- Manipulation of the Process: V, 1, pp. 4-5 and 5-6 and 12; VIII, 4, p. 10-11
- Mistakes: (*See: Promotion/Selections/Hiring: Pretext: Evidence*)
- Nurses (non-competitive promotions): (*See: Nurses: Promotions*)
- Panels (interview and rating): V, 3, p. 8-10; VII, 3, p. 10-11; **IX, 4, p. 4-5**
- Performance Appraisals (use of): II, 3, p. 3
- Position Descriptions: V, 4, p. 8-9
- Pre-Selections: III, 4, p. 7-8; V, 3, p. 13-16; V, 4, p. 4-5; VIII, 4, p. 10-11 (article)
- Pretext:
  - Evidence or Not Evidence of:
    - Affirmative Employment Plans (use of): II, 1, p. 7-8
    - Derogatory Comments: II, 2, p. 3
    - Education: (*See: Qualifications: Education*)
    - Experience: II, 1, p. 7; III, 1, p. 13; VI, 3, p. 4-5
    - Interview Not Granted as: II, 1, p. 7-8
    - Opinion (of complainant as to his/her qualifications as): (*See: Qualifications: Opinion*)
    - Mistakes: V, 1, p. 5-6
    - Performance Appraisals: V, 1, p. 4-5; VI, 4, p. 2-3
    - Priority Consideration (use of as): (*See: Promotions/Selections/Hiring: Priority Consideration*)
    - Prior Nonselections as: II, 1, p. 7
    - Seniority: IV, 3, p. 9-11; V, 3, p. 8-10
    - Subjective Factors (use of by selecting official): IV, 3, p. 9-11
  - Found: I, 1, p. 15; II, 2, p. 2-3; II, 4, p. 9-11; IV, 3, p. 9-11; IV, 4, pp. 2-3 and 8-9; V, 1, p. 4-5 and 5-6; V, 3, p. 8-10; **IX, 4, p. 4-5**
  - Not Found: I, 1, p. 16; II, 1, p. 7; II, 2, p. 7; II, 3, p. 3; III, 3, p. 4-5; IV, 3, p. 9-11; IV, 4, p. 5-6; V, 3, p. 13-16; V, 4, p. 4-5; V, 4, p. 8-9; V, 3, p. 13-16; VI, 2, p. 10-12; IX, 1, p. 6-7; IX, 3, p. 6
- Priority Consideration: III, 3, p. 4-5
- Procedures/Policies (failure to follow): V, 3, p. 8-10
- Proficiency Reports (nurses):
  - If issue involves use in noncompetitive promotions: (*See: Nurses: Promotions*)
  - If issue relates solely to the rating: (*See: Performance Appraisals*)
- Rating Panels: V, 1, p. 5-6
- Reason(s) articulated --
  - Burden of Articulation Met (specific reason given for nonpromotion or nonselection)
  - Burden of Articulation not Met (no reason or nonspecific reason given)
    - I, 1, p. 16-17; III, 3, p. 3-4; III, 4, p. 5-6; IV, 4, p. 2-3 and 4-5
  - Found not True (see Pretext Found)
  - Found True (see Pretext Not Found)
  - Inability to Accommodate: (*See: Disability: Accommodation or Religion: Accommodation*)
  - Risk of Harm or Injury (as reason cited): (*See: Disability: Direct Threat*)
- Proof: (*See: Evidence*)
- Proposed (vs. Completed) Actions (dismissal because of): VIII, 4, p. 5-7
- Protected Activity: (*See: Retaliation: Protected EEO Activity*)
- Punitive (damages): (*See: Compensatory Damages*)

## Q

### Qualifications

- Applications (...not noted in): (*See: Promotions/Selections/Hiring*)
- Disqualification (by HR specialist): (*See: Promotions/Selections/Hiring*)
- Education (as evidence of): IV, 4, p. 6-7; V, 3, p. 13-16
- Experience (as evidence of): (*See: Promotions/Selections/Hiring: Pretext: Evidence*)
- Nurses (*See: Nurses: Qualifications*)



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“Observably Superior”: (*See: Qualifications: Plainly Superior*)

Opinion (of complainant as to his or her own): IV, 3, p. 9-11

Position Descriptions: (evidence of): V, 4, p. 8-9

“Plainly Superior”: IV, 3, p. 9-11; IV, 4, pp. 2-3, 6-7, and 8-9; V, 3, p. 8-10; VI, 1, p. 5-6

Seniority (use of): (*See: Promotions/Selections/Hiring: Pretext: Seniority*)

Supplemental Qualification Statements: II, 2, p. 3

## R

Racial Harassment: (*See: Harassment: Racial*)

Racial Profiling: V, 1, p. 8-9

Reannouncing Position Vacancies (to manipulate the process): (*See: Promotions/Selections/Hiring: Manipulation of the Process*)

Reasonable Accommodation (*See: Disability: Accommodation or Religion: Accommodation*)

“Reasonable Suspicion” Standard (as relates to untimeliness of complaint): VII, 4, p. 11-12

Reassignment (as a reasonable accommodation): (*See: Disability: Accommodation*)

Reassignment (of harassment victim): (*See: Reprisal: Reassignment of Harassment Victim*)

Recency (of experience): (*See: Promotions/Selections/Hiring: Pretext Evidence*)

Records (medical): (*See: Disability: Medical Records*)

Reductions in Force (involving Title 38 Employees): V, 2, p. 12-13

Regulations (*See: EEOC Regulations*)

Relief: (*See: Remedies*)

Religion:

Accommodation: IV, 1, p. 4-5; V, 4, p. 5-7

Beliefs (nature or sincerity of): III, 4, p. 10-11

Inquiries (about): IX, 1, p. 6-7

Seasonal Displays/Activities: III, 1, p. 5

Diversity Training (as allegedly violating beliefs): III, 4, p. 10-11

Undue Hardship: V, 4, p. 5-7

Remarks (inappropriate or offensive): (*See: Comments*)

Remedies:

Inappropriate: IV, 4, p. 8-9

Limited: V, 2, p. 2-4

Removal Actions:

Conduct (because of):

Pretext:

Evidence or Not Evidence of:

Found: IX, 1, p. 2-3

Not found: VI, 4, p. 3-4

Reason(s) Articulated --

Burden of articulation met (specific reason given for removal)

Burden of articulation not met (no reason or nonspecific reason given)

Found Not True (*See Pretext: Found*)

Found True (*See Pretext: Not Found*)

Job Performance (because of):

Pretext:

Evidence or Not Evidence of:

Found: I, 1, p. 18; VI, 4, p. 2-3; IX, 1, p. 2-3

Not found: VII, 4, p. 2-3

Reason(s) Articulated --

Burden of articulation met (specific reason given for removal)

Burden of articulation not met (no reason or nonspecific reason given)

Found Not True (*See Pretext: Found*)

Found True (*See Pretext: Not Found*)

Other Reasons (because of):

Pretext:

Evidence or Not Evidence of:

Found:

Not found: II, 3, p. 5-6; IV, 4, p. 9-10

Reason(s) Articulated --

Burden of articulation met (specific reason given for removal)

Burden of articulation not met (no reason or nonspecific reason given)

Found Not True (*See Pretext: Found*)

Found True (*See Pretext: Not Found*)

Reprisal:

Adverse Action Requirement: (*See: Reprisal: Per Se*)



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Article about: I, 1, p. 19; IX, 1, p. 10-11; IX, 3, p. 10-11  
“Chilling Effect”: (See: *Reprisal: “Per Se” Reprisal*)  
Discipline/Negative Action (taken against harassment victim): II, 1, p. 5-6; III, 1, p. 9-10; VII, 1, p. 7-9;  
VIII, 1, p. 2-3; IX, 2, p. 5-6; IX, 3, p. 2-3; (See also: *Harassment: Corrective Action: Reassignment of Victim*)  
EEOC Compliance Manual (Section 8): I, 1, p. 20  
Elements of Claim: I, 1, p. 20; II, 4, p. 7-8; IV, 4, p. 5-6; V, 4, p. 3-4; VI, 2, p. 5-6; VIII, 3, p. 3-5  
Evidence of: I, 1, p. 13, 15, and 18; II, 2, pp. 3, 6, and 8-9; II, 3, p. 5; III, 2, p. 4; IX, 1, p. 2-3; **IX, 4, p. 4-5**  
Frivolous Complaints (because of): IX, 3, p. 10-11 (article about)  
Intimidation: (See: *Reprisal: “Per Se” Reprisal*)  
Interference (with EEO process): (See: *Reprisal: “Per Se” Reprisal*)  
“Material” Action: I, 1, p. 20  
Protected EEO Activity:  
    Knowledge by Management of: III, 4, p. 3-4; IV, 3, p. 5-6; IV, 4, p. 5-6; VIII, 3, p. 3-5  
    Participation Type Activity: VIII, 1, p. 6-7  
    Opposition Type Activity: II, 3, p. 5; VIII, 1, pp. 2-3 and 6-7  
    RMO (responsible management official, named as): VIII, 1, p. 6-7  
    Threat to File Lawsuit (made by supervisor): VII, 3, p. 5-6  
    Threat to File EEO Complaint (See: *Reprisal: Protected EEO Activity: Opposition Activity*)  
    Time Span Between EEO Activity and Adverse Action: III, 4, p. 3-4; IV, 4, p. 5-6;  
        V, 2, p. 8-10; V, 4, p. 3-4; VI, 2, p. 5-6; VIII, 3, p. 3-5; IX, 1, p. 2-3  
    Treatment before Activity vs. Treatment after Activity: II, 2, p. 2  
“Per Se” Reprisal: I, 1, pp. 12; and 20; II, 1, p. 8; II, 2, p. 3; III, 4, p. 2; VII, 1, pp. 6-7 and 7-9;  
VII, 3, p. 5-6 and 10-11; VIII, 2, pp. 5-7 and 9-10; IX, 2, p. 6-7  
Pretext:  
    Evidence or Not Evidence of:  
        Found: I, 1, p. 18; II, 4, p. 8-9; IV, 1, p. 8-9; IV, 3, p. 5-6; V, 2, p. 8-10; VI, 4, p. 5-6;  
            VII, 2, p. 3-4; VIII, 3, p. 5-6; IX, 1, p. 2-3; **IX, 4, p. 4-5**  
        Not found: III, 1, p. 7-8; III, 3, p. 6-7; IX, 3, p. 2-3  
    Reason(s) articulated --  
    Burden of Articulation Met (specific reason given for nonpromotion or nonselection)  
    Burden of Articulation not Met (no reason or nonspecific reason given)  
        I, 1, p. 16-17; III, 3, p. 3-4; III, 4, p. 5-6; IV, 4, p. 2-3 and 4-5  
    Found not True (see Pretext Found)  
    Found True (see Pretext Not Found)  
Problem Employees: (See: *Problem Employees*)  
Reassignment (of harassment victim): II, 1, p. 2; II, 3, p. 4; II, 4, p. 5; III, 1, p. 9-10  
Supervise (impact of complaints on ability to): VII, 1, p. 9-10; VII, 2, p. 3-4  
Technical Violation: (See: *Reprisal: “Per Se” Reprisal*)  
“Ultimate” Action: I, 1, p. 20  
“Whistle-Blowing” Activities (reprisal due to): III, 3, p. 6-7  
Restraint: (See: *Reprisal: “Per Se” Reprisal*)  
Retaliation: (See: *Reprisal*)  
Reverse Discrimination:  
    Age: (See: *Age Discrimination*)  
RIFs (See: *Reductions in Force*)  
Risk of Future Harm or Injury: (See: *Disability: Direct Threat*)

## S

Sanctions (imposed by EEOC judges): VI, 1, p. 5-6  
Sexual Harassment (See: *Harassment*)  
Sexual Identity: (See: *Trans-Gender Behavior*)  
Sexual Orientation: IV, 3, p. 13-14  
Selection Actions (See: *Promotions/Selections/Hiring*)  
Service-Connected Disability: (See: *Disability: Benefit Statutes: Veterans Compensation*)  
Settlement Agreements:  
    Breach of: VIII, 2, p. 3-4  
    Consideration (absence of): V, 2, p. 4-5  
    “Meeting of the Minds” (absence of): V, 2, p. 5-6  
    Mistake of Fact: (See: *Settlement Agreements: Meeting of the Minds*)  
    Oral Agreements: VIII, 2, p. 3-4  
Shortness of Breath: (See: *Disability: Type of*)  
Skin Conditions: (See: *Disability: Type of*)  
“Similarly Situated”: (See: *Employees*)



# OEDCA DIGEST



“Speak English Only” Rules: (*See: National Origin*)  
Stating a Claim: (*See: Failure to State a Claim*)  
Statistical Evidence: (*See: Evidence*)  
Stress: (*See: Disability: Type of*)  
Subjective Factors (use of): (*See: Promotions/Selections/Hiring: Pretext*)

## **T**

Tangible Employment Action: (*See: Harassment: Automatic Liability; See Also: Harassment: Coerced Sex*)  
Tangible Harm: (*See: Aggrieved*)  
Telework (as a reasonable accommodation for disabilities): (*See: Disability: Accommodation*)  
Temporal Proximity (in reprisal cases): (*See: Reprisal: Protected EEO Activity: Time between.....*)  
Temporary Disability: (*See: Disability: Temporary*)  
Terminations (*See: Removal Actions*)  
Threats ((*See: Reprisal “Per Se”*)  
Timeliness (of complaints): (*See: Untimeliness*)  
Title 38 Employees (right of appeal to MSPB): (*See: Reductions in Force*)  
Trans-Gender (Trans-Sexual) Behavior (discrimination due to): VII, 1, p. 5-6  
Touching (of employees): (*See: Harassment: Touching Employees*)  
Typicality: (*See: Class Action Complaints*)

## **U**

Under-Representation: (*See: Evidence: Statistical*)  
Undue Hardship: (*See: Disability: Accommodation*)  
Unfairness (as evidence of discrimination): (*See: Evidence: Unfairness*)  
Union Officials (complaints filed by): V, 3, p. 12-13  
Untimeliness (dismissal of complaint due to): VI, 1, p. 9-10; VI, 4, p. 6-8; VII, 4, p. 11-12

## **V**

VA Disability Ratings: (*See: Disability: Benefit Statutes: Veterans’ Compensation*)  
Veterans’ Compensation: (*See: Disability: Benefit Statutes: Veterans’ Compensation*)  
Veterans’ Preference (cited as a basis of discrimination): IV, 4, p. 9-10; VI, 1, p. 156VI, 1, p.  
Voidance (of settlement agreements): (*See: Settlement Agreements: Consideration and Meeting of the Minds*)

## **W**

“Whistle Blower” Complaints: (*See: Reprisal: Protected EEO Activity: Whistle Blowing Activities*)  
Witness Credibility: (*See: Credibility*)  
“WOC” Employees/Employment (without compensation): (*See: Employees*)